United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

77-7062

To be argued by
LOUIS J. MARTINE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
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ANGELO ROSARIO, CLERK
SECOND CIRCUIT

ROBERT E. McDONNELL and ROBERT DeMARTINO,

Plaintiffs-Appellants,

—*against*—

SOUTHERN VERMONT LAND COMPANY, INC., HARRY S. PATTEN, MORTON FREEDMAN, and PHILIP GRANDE,

Defendants-Appellees.

On Appeal from an Order of the United States District Court for the Eastern District of New York

BRIEF FOR DEFENDANT-APPELLEE, PHILIP GRANDE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ROBERT E. McDONNELL and ROBERT DeMARTINO,

Plaintiffs-Appellants,

-against-

SOUTHERN VERMONT LAND COMPANY, INC., HARRY S. PATTEN, MORTON FREEDMAN, and PHILIP GRANDE,

Defendants-Appellees.

Docket No: 77-7062

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BRIEF OF DEFENDANT-APPELLEE

PHILIP GRANDE

1. A STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Can the plaintiffs obtain in personam jurisdiction by virtue of the long arm statute of the State of New York as defined in the New York C.P.L. & R. §302 (a) (1) & (2) or was the order of the District Court correct in dismissing the complaint on the ground that the Court lacked in personam jurisdiction based upon the facts herein as applied to said statute?

"A" refers to Appendix followed by Page Number.

II. A STATEMENT OF THE CASE

The plaintiffs herein caused a summons and complaint to be issued which was served upon the defendants in March of 1976 (A-35). The thrust of the complaint is to recover money damages allegedly sustained as a result of defendants' fraudulent inducements to purchase certain realty located in Massachusetts. Defendant Freedman, plaintiffs' attorney in the transaction, is also charged with negligence. The alleged fraud was a representation that a particular plot contained three hundred (300) acres when in fact it contained approximately two hundred (200) acres. After service of the summons and complaint and before joining issue, defendants Southern Vermont, Harry S. Patten and Philip Grande moved to dismiss the action for lack of in personam jurisdiction pursuant to Rules 12 (b) (2) and 12 (b) (4) F.R. Civ. P.. Defendant Freedman did not join in the motion.

An evidentiary hearing was ordered by the Court and was conducted on December 3, 1976, which resulted in an opinion and order dismissing the complaint on the grounds that the Court lacked in personam jurisdiction. Plaintiffs-appellants are appealing said Order.

III. STATEMENT OF FACTS

The property in issue is located in Hancock, Massachusetts (A-50). Plaintiff McDonnell is a New Jersey resident and Plaintiff DeMartino is a New York resident (A-3). Defendant Southern Vermont is a foreign corporation duly organized and existing in the State of Vermont. Defendant Patten, who owned the property, was a resident of the State of Vermont with a place of business in Williamstown, Massachusetts (A-30). At no time material to the instant litigation was Patten in the State of New York (A-30). Defendant Grande, a Massachusetts resident during all time relevant herein, conducted a real estate brokerage business in the State of Massachusetts (A-47, 48). Defendant Freedman is a Massachusetts attorney who represented the plaintiffs in the purchase of the property herein (A-52).

On July 6, 1973, plaintiffs without a specific appointment entered defendant Grande's place of business and informed him of their interest in purchasing property in the area (A-48). They were shown the property in question and returned that same day to defendant Grande's office where they signed an agreement to purchase same for the sum of One Hundred Sixty Thousand ($160,000.00) Dollars and issued a check as down payment in the amount of Sixteen Thousand ($16,000.00) Dollars (A-50, 51, 52). They inquired

if defendant Grande knew any attorneys in the area (A-32, 52). One of those he recommended was defendant Freedman (A-32, 52). Plaintiffs thereafter retained Freedman as their attorney (A-52).

Several days later defendant Grande notified plaintiffs that title was ready to be closed (A-32). He was informed that because of business activity, the plaintiffs could not come to Massachusetts (A-32, 53). He agreed to come to New York with their attorney, defendant Freedman, and to meet at LaGuardia Airport on July 13, 1973 (A-54).

There is conflicting evidence as to whether or not the meeting lasted for forty five (45) minutes or two and one-half (2 1/2) hours, and also as to all matters discussed at the meeting (A-38, 56, 68, 69). It is not disputed that the parties were the plaintiffs, their attorney, and the real estate broker (A-53). It is also undisputed that neither the seller nor his attorney were present (A-56, 57).

At this meeting the plaintiffs executed various documents relating to the mortgage on the property and tendered a check for the balance of the purchase price (A-55). At the conclusion of the meeting both defendants Grande and Freedman returned to Massachusetts and the following day met the seller's attorney at the Register's office whereat and wherein the mortgage documents

and check were given to him and the deed recorded (A-30, 33, 57). The meeting at LaGuardia was the only meeting conducted in New York City and at no time did defendant Grande have an office in New York City (A-48, 57). The discussions and negotiations which led to the signing of the contract were conducted in Massachusetts at the time the contract was signed (A-62). The plaintiffs themselves do not allege that any different representations were made at LaGuardia, but merely that the alleged initial ones were repeated (A-72, 73).

POINT I

THE DEFENDANTS HEREIN WERE NOT TRANSACTING BUSINESS WITHIN THE STATE OF NEW YORK IN THAT THEY DID NOT ENGAGE IN PURPOSEFUL ACTIVITY WITHIN THE STATE OF NEW YORK AND MADE NO ATTEMPT TO VOLUNTARILY INVOKE THE PROTECTION AND BENEFITS OF ITS LAWS, CONSEQUENTLY THEY WERE NOT SUBJECT TO IN PERSONAM JURISDICTION BY VIRTUE OF THE LONG ARM STATUTE AS CODIFIED IN C.P.L. & R. §302 (a) (1)

C.P.L. & R. §302 entitled Personal Jurisdiction By Acts of Non-Domiciliaries (long arm statute) provides in part as follows:

> "(a) Acts which are the basis of jurisdiction 'As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent.
>
> 1. Transacts any business within the state; or

2. Commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. Commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. Owns, uses or possesses any real property situated within the state.

Plaintiffs predicate jurisdiction on subdivisions (A) (1) and (A) (2). The point herein deals solely with §302 (A) (1).

Appropriate decisional law stands for the proposition that there is no hard, fast or mechanical test on which to predicate a definitive answer as to what constitutes transacting business within the State. The Courts hold that a determination of transacting business within the State rests on the many factors and facts inherent and native to the particular case in issue, Franklin National Bank v. Krakow, 295 F. Supp. 910, 918 (D.D.C. 1969); Schroeder v. Loomis, 46 Misc.2d 184, 186, 259 N.Y.S. 2d 42, 46 (Sup. Ct. 1965); Aurea Jewelry Creations, Inc. v. Lissona , 344 F. Supp. 179, 181 (S.D. N.Y. 1972).

The Courts have afforded us with a principle or signpost to aid in determining whether or not a party is engaged in the transaction of business within the State of New York. The crucial test is do the facts indicate whether or not the defendant was engaged in purposeful activity and an attempt to invoke the benefit and protection of the laws of the State of New York. If no such activity was extant, then the defendant is not so engaged. Thus, casual or occasional activity would not come within the purview of the long arm statute, Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 NY 2d 443, 447, 261 N.Y.S. 2d 8, 18 (1965); Arcata Graphics Corp. v. Murrays Jewelers & Distributors, Inc., 384 F. Supp. 469, 472 (W.D.N.Y. 1974); Leasco Data Processing Equipment Corp. v. Maxwell, 319 F. Supp. 1261 (S.D. N.Y. 1970), aff'd in part, rev'd in part, remanded in part, 468 F. 2d 1326 (2d Cir. 1972), Kaye Martin v. Brooks , 267 F. 2d 394, 397 (7th Cir), cert. denied, 361 U.S. 832, 80 S. Ct. 84 (1959), Standard Wine & Liquor Co., Inc. v. Combay Co., 20 N.Y. 2d 13, 17, 281 N.Y.S. 2d 299, 301 (1967), Liquid Carriers Corp. v. American Marine Corp., 375 F.2d 951 (2d Cir. 1967).

It is respectfully submitted that the facts in the instant case do not warrant a finding of purposeful activity. The only contact that New York had

was that a brief trip was made to accomodate the plainiffs, without the seller or his attorney being present (A-56,57). The brevity and the casualness of the trip is best illustrated by the uncontested fact that the New York meeting herein above referred to took place at LaGuardia airport (A-53,56,57). In Chertok v. Ethyl Corp of Canada, 341 F. Supp. 1251 (S.D.N.Y. 1972) wherein the plaintiffs sued for a finder's fee, the Court found no purposeful activity or indication that defendant had availed itself of the benefits or privileges of conducting business in New York. The original contract therein had been percipitated by the plaintiffs and a trip to New York was made at the behest of and to accomodate the plaintiff and lasted for one business day. In AIL, Division of Cutler-Hammer, Inc. v. Symetrics Industries, Inc., 360 F. Supp. 1138 (E.D. N.Y. 1973), the Court reached the conclusion that the defendant was not transacting business in New York for the purpose of in personam jurisdiction and this despite the fact that a few trips were made to New York by defendant's employees. All negotiations which culminated in the contract had taken place in Florida. In the instant case, they took place in Massachusetts.

POINT II

THE DEFENDANTS HEREIN DID NOT COMMIT A TORTIOUS ACT WITHIN THE STATE OF NEW YORK AS ARGUENDO THE MISREPRESENTATIONS ON WHICH IT IS ALLEGED PLAINTIFF RELIED WERE MADE IN MASSACHUSETTS AFTER WHICH THE CONTRACT WAS SIGNED, CONSEQUENTLY THE DEFENDANTS ARE NOT SUBJECT TO IN PERSONAM JURISDICTION BY VIRTUE OF THE LONG ARM STATUTE AS CODIFIED IN C.P.L. & R. §302 (a) (2)

The second basis for in personam jurisdiction that the plaintiffs proffer entails C.P.L. & R. §302 (a) (2) " . . . . commits a tortious act within the State . . . . ". Assuming arguendo that any misrepresentation was made on which plaintiffs relied, the misrepresentation was made in Massachusetts and resulted in the plaintiffs executing the contract herein. The purchase price was fixed in the contract. Parenthetically at the LaGuardia Airport meeting the plaintiffs received a tax adjustment schedule (A-117) setting forth inter alia the acreage involved, listing same as approximately two hundred (200) acres. In Kramer v. Vogel, 17 N.Y. 2d 27, the Court of Appeals held that no tort was committed in New York where non residents made false representations outside of New York which induced plaintiffs to rely thereon in New York with resulting injury therein. As stated, the contract was signed in Massachusetts after negotiations and alleged representations were conducted and made.

As stated in Lehigh Valley Industries Inc. v. Birenbaum, 389 F. Supp. 798, 808 (S.D. N.Y.), aff'd 527 F.2d 87 (2d Cir. 1975), a blind assertion of conspiracy as claimed herein is insufficient to give jurisdiction. The burden of proof is upon plaintiffs in their assertion of jurisdiction, AIL, Division of Cutler-Hammer, Inc. v. Symetrics Industries, Inc., (supra). It is respectfully urged that the issue of agency with regards to defendant Grande is not reached as he was the broker in the transaction and further that as stated

above, there is no basis for in personam jurisdiction.

The brief herein does not address itself to the other portions of C.P.L. & R. §302 in that it is respectfully stated that the facts herein do not warrant a consideration thereof and further that no issue was raised therewith either in appellant's brief nor in the District Court.

CONCLUSION

FOR ALL OF THE REASONS STATED THE DECISION AND ORDER OF THE DISTRICT COURT SHALL BE AFFIRMED.

Respectfully Submitted

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

376—Affidavit of Service by Mail The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

ROBERT E. McDONNELL and ROBERT DeMARTINO,

Plaintiffs-Appellants,

against

SOUTHERN VERMONT LAND COMPANY, INC., HARRY S. PATTEN, MORTON FREEDMAN, and PHILIP GRANDE,

Defendants-Appellees.

State of New York, County of New York, ss.:

Bernard S. Greenberg for William J. Dockery, Esq., being duly sworn deposes and says that he is agent the attorney for the above named Brief for Defendant-Appellee herein. That he is over 21 years of age, is not a party to the action and resides at 162 E. 7th St. N.Y., N.Y.

That on the 15th day of April, 1977, he served the within

Brief for Defendant-Appellee, Philip Grande

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by depositing two true copies
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
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directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 15th day of April, 1977

Bernard J. Greenberg

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. [illegible]
Qualified in Delaware County
Commission Expires March 30, 1978